No. 4038.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Elizabeth Houston, as Sole Beneficiary Under the Will of Otho S. Houston, Deceased, and as Executrix of the Estate of Otho S. Houston, Deceased,

Plaintiff in Error,

vs.

J. M. Rosborough,

Defendant in Error.

PETITION FOR REHEARING.

LUCIUS K. CHASE,
Attorney for Plaintiff in Error.

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Request is respectfully made that an order for rehearing be entered herein for the reason that the court did not pass upon the question set forth on page 34 of plaintiff's in error opening brief, whether the judgment against Elizabeth Houston, as executrix, was excessive to the extent of twenty-seven hundred sixty dollars ($2760.00) thereof, the defendant in error, in an law action brought to recover damages for fraud

arising out of a trade of real estate, having recovered judgment against Elizabeth Houston not only for seven thousand dollars ($7000.00), the difference between the reasonable value of what he parted with and the reasonable value of what he received, but also the further sum of twenty-seven hundred sixty dollars ($2,760.00), which consisted of the rental value of Rosborough's demised premises from the date of the trade to the date suit was filed.

As stated in our opening brief, it was found in paragraph XIV of the findings that the difference in value between the property defendant in error traded and the value of the property he received was seven thousand dollars ($7,000.00). [Tr. p. 57.]

The court then found among the conclusions of law that Rosborough had been damaged to the extent of the difference in values between the property traded and the property received, which difference was again fixed at seven thousand dollars ($7,000.00), and had been further damaged in the further sum of twenty-seven hundred sixty dollars ($2760.00), the rental value of the property traded by him from the date of the trade to the date of filing the complaint. [Tr. p. 59.]

In our brief we discussed the doctrine and contended that in an action for damages for fraud arising out of the exchange of properties, the measure of damages is simply the difference between the reasonable value of what the defrauded party parted with and the reasonable value of what he received, citing decisions

from the Federal Courts, the Supreme Court of California, and the Supreme Court of the United States in support thereof.

The answer of counsel for defendant in error to our contention is contained in pages 27 and 28 of their brief, and their contention is that because no bill of exceptions was filed, the matter cannot be considered, admitting, however, that we are sound in our legal contentions. Counsel for defendant in error state, on page 27 of their brief:

"We find ourselves in agreement with counsel in the general statement of law at page 35 of the opening brief of plaintiff in error to the effect that the measure of the recovery of damages for fraud arising out of an exchange of property is the difference in reasonable value of what the defrauded party parted with and the reasonable value of what he received. But, as just above pointed out, there is no bill of exceptions before this court which would permit inquiry into the question of whether or not the trial court correctly applied the law."

Our answer to counsels' contention is that no bill of exceptions is necessary because the facts are entirely set forth in the findings. The facts as set forth in the findings show the value of Rosborough's property and the value of Houston's property at the time of the trade, and that the difference in value between the two is seven thousand dollars ($7000.00), and then that the rental value of the property traded by Rosborough was twenty-seven hundred sixty dollars ($2760.00), judgment having been rendered in the aggregate of both said sums.

It thus appears from the facts shown of record that judgment was rendered not only for the difference in the value of the properties traded but also for the value of the rent of the property traded by Rosborough from the date of the trade to the date of filing the complaint.

As pointed out in our answering brief, in pages one and two thereof, it is the law that where the subject matter to be reviewed appears by the record, no bill of exceptions is necessary in order to authorize the review thereof.

It has been specifically held by the Circuit Court of Appeals of the Sixth Circuit that a special finding made by the trial court becomes a part of the record, and the Appellate Court may, without a bill of exceptions, determine whether the finding is sufficient to support the judgment. (Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. Rep. 123.) And it is the rule of this court that whenever error is apparent from the record, it is open to revision, whether it has been made to appear by bill of exceptions or in any other manner. (Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Fed. Rep. 26.)

It seems patent that the rule laid down in the Sixth Circuit, that the findings are part of the record, should be declared the rule of this circuit. If the findings are part of the record, then it appearing from the findings that an excessive judgment has been rendered, to the extent of the excess of such judgment, the judgment should be ordered reduced and a rehearing had for

that purpose. We gathered the impression upon oral argument that the court concurred in this view.

Inasmuch as the question involved was overlooked in the decision rendered by the court, we respectfully request that a rehearing be granted, and upon the rehearing that the judgment be reduced to the extent of twenty-seven hundred sixty dollars ($2760.00).

Respectfully submitted,

LUCIUS K. CHASE,

Attorney for Plaintiff in Error.

I hereby certify that I am attorney of record for the above entitled plaintiff in error, and that in my judgment the foregoing petition for rehearing is well founded, and is not interposed for delay.